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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BILLY ROY WHITE, Defendant and Appellant.	B187074 (Los Angeles County Super. Ct. No. KA071353-02)

Appeal from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed in part and remanded in part with directions.

Jonathan B. Steiner and Ronnie Duberstein, California Appellate Project, for Defendant and Appellant.

Edmund G. Brown, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E.Winters, Supervising Deputy Attorney General, and Taylor Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Billy Roy White of one count of sale of a controlled substance. At White's trial, the prosecutor introduced a photographic exhibit, People's exhibit 1, identified as the drugs White sold to an undercover police officer. People's exhibit 1 was not produced before trial, and it was, arguably, inconsistent with another photograph, defense exhibit A, which was produced before trial. After the People rested, White's trial counsel asked to recall officers to ask them about defense exhibit A. The trial court denied the request. White now appeals, contending that the trial court abused its discretion and denied him his right to present a complete defense. He also contends that there is insufficient evidence of his prior prison terms. We remand the case for a retrial on the prison priors. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On June 28, 2005, Officer Richard Aguiar was working undercover. Laverne Ingram[1] approached him and asked, " 'Do you want to buy some C.K.[?]' "—rock cocaine. Officer Aguiar said yes. Ingram led him to White. Officer Aguiar gave a $20 bill to Ingram, who handed it to White. White removed off-white rocks from a white piece of grocery bag he was holding in his right hand. The rocks were in a sandwich bag material. White then took two rocks of an off-white colored substance that looked like rock cocaine and handed the rocks to Ingram, who gave them to Officer Aguiar. Either Ingram or White told Officer Aguiar, " 'Here's the two rocks. It's the best shit around. You'll be begging for a third. You might as well buy a third rock now.' " Officer Aguiar left. He signaled to nearby officers to arrest Ingram and White.

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1 Laverne Ingram, who has not appealed, was tried with White.

II. Procedural background.

Trial was by jury. The jury found White guilty of count 1 for sale/transportation/offer to sell a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)). The trial court, on October 6, 2005, sentenced White to four years plus two one-year terms under Penal Code[2] section 667.5, subdivision (b).

DISCUSSION

I. Any error in refusing to allow White to recall police officers to testify about defense exhibit A was harmless.

A. *Additional facts*.

Before trial began, the prosecution disclosed defense exhibit A. Defense exhibit A depicts two items wrapped in plastic. During his direct examination of the first witness, Officer Aguiar, the prosecutor did not show him defense exhibit A. Instead, the prosecutor showed Officer Aguiar People's exhibit 1, a photograph of two large, off-white rocks separated from a plastic bag or wrap. People's exhibit 1 had not been previously disclosed to the defense.[3] Officer Aguiar identified People's exhibit 1 as a photograph of the rocks Ingram and White gave him, and which he later turned over to Officer Elias Linn. White's trial counsel did not cross-examine Officer Aguiar regarding defense exhibit A or People's exhibit 1.

Officer Robert Devee next testified that he watched the entire transaction from a distance. White's trial counsel did not cross-examine Officer Devee about defense exhibit A or People's exhibit 1.

Officer Linn then testified that People's exhibit 1 showed the items that Officer Aguiar gave to him. Officer Linn also said that the items were wrapped inside plastic when Officer Aguiar handed them over, but that they were later separated. Officer Linn took the items and tested them with a narcotics testing kit, called a Wells test kit. The

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2 All further undesignated statutory references are to the Penal Code.

3 It is not clear exactly when the defense received People's exhibit 1. Defense counsel said he got it after trial started, when it was being presented to the first witness. The People also failed to disclose defense exhibit B before trial. Defense exhibit B, however, was merely a blow-up of People's exhibit 1.

rocks tested positive for cocaine base. Officer Linn booked the items under file number 05104188. White's trial counsel did not cross-examine Officer Linn about defense exhibit A or People's exhibit 1.

Thomas McCleary, a senior criminalist, analyzed the items submitted to him under file number 05104188. They tested positive for cocaine base. On cross-examination, White's trial counsel showed McCleary defense exhibit A. McCleary said it was difficult for him to tell what the photograph depicted. He was unaware of any other drugs collected in connection with this case which might have been booked or tested. He was not able to tell from defense exhibit A whether he had tested the items depicted.

Officer Jerry Wright, who arrested White, also did not recognize defense exhibit A and did not know how it was generated.

The People rested, and the defense said it had no witnesses.

White's trial counsel then moved to admit defense exhibit A, the People objected on the ground it lacked foundation. White's counsel argued that defense exhibit A had handwritten on it "05-104188"—the file number assigned to the drugs White sold to the officer—and that the number provided an adequate foundation. He added that defense exhibit A was the only photograph he had received before trial, and he therefore anticipated that the prosecution would use it. Instead, the prosecution used People's exhibit 1, which was disclosed during trial.

The trial court said it could allow the defense to recall officers, but White's trial counsel responded that the problem was he had no idea who took the photograph. He therefore asked to recall all six officers involved in White's arrest. The trial court then said that it would not allow the officers to be recalled because trial counsel had the opportunity to ask them about defense exhibit A. Defense counsel replied that he would not have known to ask them about defense exhibit A until after the chemist, McCleary, couldn't identify the photograph. It was only when McCleary couldn't identify defense exhibit A that trial counsel realized it was inconsistent with People's exhibit 1. He did not immediately recognize the significance of defense exhibit A, when compared to People's exhibit 1.

The trial court sustained the People's objection to defense exhibit A, and it was not admitted into evidence.

B. *White's trial counsel could have cross-examined the officers about defense exhibit A.*

By refusing his defense counsel's request to recall officers, White contends that the trial court abused its discretion and violated his state and federal constitutional right to present a complete defense (U.S. Const., Amends. V, VI, XIV). We disagree.

A party's ability to recall a witness is subject to the court's discretion. (See, e.g., Evid. Code, §§ 774, 778.) Here, the only photograph the prosecution turned over to the defense before trial was defense exhibit A. The prosecution did not use defense exhibit A. The prosecution instead used People's exhibit 1, which was arguably inconsistent with defense exhibit A. This inconsistency between the two exhibits did not immediately strike defense counsel.

But defense counsel's failure to immediately recognize the potential importance of defense exhibit A does not render the trial court's ruling an abuse of discretion. Defense counsel had defense exhibit A before trial. The People showed exhibit 1 to its first witness, Officer Aguiar, who identified it as depicting the items he bought from White. Therefore, at the very outset of trial, any inconsistency between the photographs was in the open. Defense counsel nonetheless failed to cross-examine Officers Aguiar, Devee, and Linn about any inconsistency between People's exhibit 1 and defense exhibit A.

White, however, argues that the failure to cross-examine the officers with defense exhibit A must be considered with the prosecution's failure to produce People's exhibit 1 before trial. As defense counsel argued to the trial court, "[ ] I did not think to myself, oh, that's inconsistent with the picture. I mean, I can't immediately recognize the significance of it. I just didn't. [¶] [¶] I mean that's why discovery comes 30 days before trial, not in the middle of picking a jury or when the first witness is called. I'm just not that brilliant. The problem I have is I'm sitting here with a piece of discovery received from the prosecution, from the police through the prosecution. And it's the only photograph up until this trial starts. Now I get an inconsistent photograph and an objection from the D.A. as to foundation when had he served this timely, I could have

lined up my witness. I could have laid the foundation. I could have found out which officer took the report had it been served timely, but it wasn't."

Although the People did not produce exhibit 1 before trial, the defense did not object to People's exhibit 1 when it was shown to the witnesses, even though it is clearly a different photograph than defense exhibit A, which was produced before trial.[4] In light of that failure to object and the fact that defense counsel had defense exhibit A before trial, we simply cannot say that the trial court abused its discretion when it denied White's request to recall officers.

Nor can we find that White was deprived of the opportunity to present a complete defense, namely, the People failed to prove beyond a reasonable doubt that the items tested were actually the items depicted in People's exhibit 1. The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities through cross-examination, thereby calling to the fact finder's attention reasons for giving scant weight to a witness's testimony. (*United States v. Owens* (1988) 484 U.S. 554, 558.) Defense exhibit A was disclosed before trial. White's trial counsel therefore had a full and fair opportunity to question Officers Aguiar, Devee, and Linn about defense exhibit A. Under these circumstances, White's constitutional rights were not violated.

In any event, any error was harmless under both *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Chapman v. California* (1967) 386 U.S. 18. Four of the officers involved in the undercover operation testified. One of them, Officer Linn, testified that Officer Aguiar gave him the items he bought from White. Office Linn took those items

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4 Defense counsel did not object to People's exhibit 1 when it was shown to the officers. But, after the People rested and during argument about the admissibility of defense exhibit A, defense counsel did argue that the People should have produced People's exhibit 1 before trial under *Brady v. Maryland* (1963) 373 U.S. 83. We make no determination whether there was a *Brady* violation, as it is not an issue before us. But, at a minimum, the prosecutor, before showing People's exhibit 1 to Officer Aguiar, should have noted on the record that the exhibit had not been previously produced.

and tested them with a Wells test kit. They tested positive for cocaine base. Therefore, items that were obtained from White tested positive for cocaine base before they were sent to the criminalist.

II. Sufficiency of the evidence of the prison priors.

An amended information alleged that White had served two prior prison terms under section 667.5, subdivision (b) (section 667.5(b)). White waived a jury trial on the allegations. At White's court trial on his priors, White's trial counsel stated that his client would admit his priors. The People took White's admissions. White now contends that he did not admit and the prosecution did not prove each element of the section 667.5(b) sentence enhancement allegation.

Section 667.5(b) provides: "[W]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." Due process requires the prosecution to prove each element of a sentence enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) A sentencing enhancement under section 667.5 requires proof that the defendant (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. (*Id.* at p. 563.) The enhancement may not be imposed for any prior felony for which the defendant did not serve a prior separate prison term. (§ 667.5, subd. (e).)

Here, the focus is on element three, namely, did the prosecution prove that White served a prison term for each conviction and that he served a separate prison term for each conviction? At the sentencing hearing, the People did not mention that third element. Rather, the People inquired of White:

"Q. And, Mr. White . . . it is alleged against you that you suffered two prior convictions pursuant to Penal Code section 667.5(b); firstly, in case number FWZ021822, for a violation of Penal Code section 666, with a conviction date of January 29, 2001, out of San Bernardino Superior Court; secondly, in case number KA035831, for a violation of Penal Code section 666, with a conviction date of May 13, 1997, out of Los Angeles Superior Court. [¶] It is also alleged that pursuant to section 667.5, that you did not remain free of prison custody for and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term. [¶] Mr. White, do you understand the prior convictions that have been alleged against you?

"Defendant White: Yes, I do." The People then advised White of his constitutional rights, and asked if he wished to admit the prior allegations. White replied, yes, and the People then asked him, "And, Billy Roy White, sir, do you admit that you suffered these two following prior convictions pursuant to Penal Code section 667.5(b): Firstly, in case number FWZ021822 and case number KA035831? Do you admit these to be true, sir?" White replied, "Yes," and his counsel joined in the waivers and concurred in the admissions. The prosecution introduced no other evidence.

As support that his admissions were insufficient to support the section 667.5 allegation, White cites *People v. Lopez* (1985) 163 Cal.App.3d 946 (*Lopez*) and *People v. Epperson* (1985) 168 Cal.App.3d 856 (*Epperson*). In *Lopez*, the Court of Appeal upheld the trial court's order striking two prior serious felony allegations, which the defendant had admitted. (*Lopez, supra,*163 Cal.App.3d at pp. 948, 951.) The allegations failed to specify, and the defendant was never asked to admit, that his burglary convictions were for *residential* burglaries, which would have qualified them as " 'serious felonies' " under section 667, subdivision (a). (*Lopez,* at p. 950; but see *People v. Thomas* (1986) 41 Cal.3d 837, 839 [admission of burglary conviction without express admission of its residential character sufficient to permit imposition of serious felony enhancement].) Citing section 667.5(b), the court then noted that "[defendant's] admission that the prior convictions were valid cannot be construed as an admission of the allegations that he served prior, separate prison terms for each of those convictions." (*Lopez,* at p. 951.)

In *Epperson*, *supra*, 168 Cal.App.3d 856, the court—albeit in dicta—similarly stated that the defendant's admission of the prior convictions did not include an admission of all the necessary elements of the enhancement alleged under section 667.5(b). (*Id.* at p. 865.)

The People respond that *Lopez* and *Epperson*, to the extent they stand for reversal per se, are no longer good law. Citing *People v. Mosby* (2004) 33 Cal.4th 353, the People contend that this issue is reviewed using a totality of the circumstances test. The issue in *Mosby* was: "When, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, can that admission be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and to confront witnesses" (*Id.* at p. 356.) The court answered yes, if the totality of the circumstances surrounding the admission supports such a conclusion.

It is not clear, however, that a totality of the circumstances test applies where, as here, the claim is sufficiency of the evidence to support a sentencing enhancement allegation. In any event, regardless of whether that test applies, the evidence is insufficient to support the section 667.5(b) sentencing enhancement allegation.

Although a defendant who admits a charge of a prior conviction is held to have admitted as great a charge as is contained in the information, an admission of prior convictions cannot be construed as an admission that separate terms were served therefore, in the absence of an allegation in the information that the defendant served separate terms on the prior convictions. (*People v. Welge* (1980) 101 Cal.App.3d 616, 623.) The amended information here alleged that White suffered the two convictions. After listing the two convictions, the amended information alleged "[ ] that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." The amended information does not allege that White served *separate* prison terms for the two convictions. Nor does the record show that the prosecutor, in taking White's admission, ever mentioned either service of prison terms or service of separate prison

terms. Also, the record does not show either that the amended information was read to White at his sentencing hearing or that he discussed it with his counsel.[5]

Upon remand, the People may retry the section 667.5(b) allegation. (*People v. Barragan* (2004) 32 Cal.4th 236, 258-259.)

DISPOSITION

We remand this matter for retrial on the section 667.5(b) allegations only. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING,

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5 The problem with the evidence is highlighted by what occurred when White's codefendant, Ingram, was asked to admit his prior prison terms. Ingram gave an equivocal response when asked to admit his priors. The prosecutor then asked him to review his 969b packets and to discuss it with his attorney. After reviewing his 969 packets and talking to his attorney, Ingram admitted that he suffered prior convictions.